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IN THE

Supreme Court of the United States

October Term, [illegible] 1969

Number 262

WILLETT WILSON,

Petitioner

VS.

CITY OF PORT LAVACA, TEXAS, ET AL,

Respondents

* * * *

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

* * * *

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NO.

WILLETT WILSON,

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CITY OF PORT LAVACA, TEXAS, ET AL,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

* * * *

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on April 28, 1969.

CITATIONS TO OPINIONS BELOW

The opinion of the District Court printed in Appendix B, page 11 is reported in 285 F. Supp. 85, 87. The opinion of the

Circuit Court of Appeals printed in Appendix B, page 11, is unreported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 28, 1969 (Transcript, Volume II, page 90). Rehearing was denied on May 23, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1) and Section 1257(3), Appendix A, page 8.

QUESTIONS PRESENTED

1. Whether Texas Statute Article 342-709 is repugnant to Amendment Fourteen, Section 1, United States Constitution (Due Process and Equal Protection) because it denys Petitioner material evidence of large amounts of bank and savings and loan deposits from the only available source, which would be a defense to Respondents' ad valorem tax suits.

2. Whether Petitioner is entitled to a hearing before a three judge court because the validity of a State Statute is drawn in question on the ground of its being repugnant to the Constitution of the United States.

3. Whether Petitioner if not entitled to a hearing before a three judge court, is entitled to relief in the Circuit Court of Appeals or District Court, he having exhausted his state court remedies which have proven inadequate.

STATUTES INVOLVES

Amendment Fourteen, Section 1, United States Constitution (Due Process and Equal Protection).

28 USC, Sections 1254 (1) and 1257(3).

Texas Statute, Article 342-709 and Articles 7145 and 7147.

Article VIII, Section 1, Texas Constitution.

These are all printed in Appendix A, Page 8.

STATEMENT

Petitioner having exhausted his state court remedies which proved inadequate sought a declaratory judgment from a three judge court on the ground that a portion of Texas Statute Article 342-709 violates both Amendment Fourteen of the United States Constitution, as well as Article VIII, Section 1 of the Texas Constitution, because said portion of the Texas Statute denies Petitioner material evidence from the only available source, namely the local bank and savings and loan institutions, of large amounts of unassessed taxable deposits needed to show unequal, unfair and discriminatory taxation of his property which would be a defense to the City's tax claim against him each year.

Petitioner, in the alternative, also sought equitable relief from a single judge court in the event he was not entitled to a hearing before a three judge court.

As directed by the District Court, the case was submitted by briefs, so there was no chance to offer any evidence for the record. A memorandum and order dated January 23, 1968, dismissing Petitioner's complaint was signed by three judges, adopted by the judge in whose court the case was originally filed and is reported as Wilson vs. City of Port Lavaca, Texas, 285 F. Sup. 85 (1968). The opinion of the District Court

sufficiently sets out the facts (Transcript of Record, Volume I, page 73). Petitioner differs only with the conclusions reached by the Court.

The Opinion, Judgment and Order Denying Rehearing of the Fifth Circuit Court of Appeals printed in Appendix B, page 11, is unreported.

REASONS FOR GRANTING THE WRIT

1. Clearly, the questions presented are of importance to the fair and equal assessment and collection of ad valorem taxes by the municipalities of the State of Texas.

2. There is no question but that banks and savings and loan association deposits are taxable, Texas Statute, Articles 7145 and 7147 (Appendix A, page 8). Article VIII, Section 1 of the Texas Constitution (Appendix A, page 8), guarantees equal and uniform taxation. However, because of Texas Statute, Article 342-709 (Appendix A, page 8) no one, not even the tax assessor and collector can determine amounts of the deposits for the purpose of assessing them, and even the names of the depositors have been refused because of the Texas Statute.

3. This Texas Statute, Article 342-709, permits a continuing violation of fair and equal ad valorem taxation because only real property can be determined and taxed, since bank and savings and loan association deposits and depositors cannot be determined. The showing of unequal and unfair taxation of his property by a taxpayer because of large amounts of taxable deposits of others being left off the tax rolls necessitating a higher rate or ratio at which to tax the assessed property on the tax rolls would be a defense to a tax suit against him and in Whelan vs. State, 282 SW2d 378, 383 (Appendix B, page 11) our Texas Supreme Court says if a defense to a tax suit is denied a taxpayer because of a State

Statute, this would make the statute unconstitutional. However, in Wilson vs. City of Port Lavaca, Texas 407 SW 2d 325, ref. n.r.e., the taxpayer was denied this material evidence needed for his defense to the City's tax claim because of Texas Statute, Article 342-709. Petitioner contends this makes the Texas Statute repugnant to Amendment Fourteen of the United States Constitution since it denies him due process of law, and the equal protection of the laws.

4. The decision of the courts below are believed to be erroneous because if they are not, taxable bank and savings and loan deposits can never be taxed unless voluntarily rendered. There is just no way to determine them because of Texas Statute, Article 342-709, and Article VIII, Section 1 of the Texas Constitution has no meaning and is unenforceable because Article 342-709 permits as much property in the form of taxable deposits to be left off the tax rolls, in denying the material evidence thereof, as is placed thereon in the form of taxable realty and real property owners are thereby discriminated against in being required to pay taxes at a rate or ratio at least twice as high as would be necessary if taxable deposits were determined and taxed.

Petitioner, a large real property owner, is entitled to relief from this discriminatory taxation. This he can get if the objectionable portions of Texas Statute, Article 342-709 are declared unconstitutional, thereby permitting him to secure the material evidence of untaxed deposits needed to show unequal and unfair taxation as a defense to Respondent's tax claims.

Petitioner's remedy at law in the state courts proved inadequate, Wilson vs. City of Port Lavaca, 407 SW2d 325, ref. n.r.e. (Appendix B, page 11). In Hillsborough T. P. vs. Cromwell, 66 S. Ct. 445, 451, (Appendix B, page 11), a similar

type case involving tax discrimination, Mr. Justice Douglas says:

> "A remedy at law cannot be considered adequate so as to prevent equitable relief unless it covers the entire case made by the bill in equity."

In Milligan vs. Corsicana Independent School District, 381 SW2d 97, 98, ref. n.r.e., it was held that school district's tax plan which failed to include deposits of banks in district's valuation was fundamentally erroneous under Texas Constitution, Article VIII, Section 1, and Texas Statutes, Articles 7145 and 7147. In Siler vs. Louisville & N.R. Co., 213 US 175, 191, 193; 29 S. Ct. 451, 454, it was held:

> "The Federal questions as to the invalidity of a state statute because as alleged, it was in violation of the Federal Constitution, gave the circuit court jurisdiction and, having properly obtained it, that court had the right to decide all questions in the case."

CONCLUSION

For the foregoing reasons and because of the uncertainty surrounding the Texas remedy to protect the taxpayer's federal right, a refusal to dismiss Petitioner's bill would have been a proper exercise of discretion, and this petition for writ of certiorari should be granted.

Respectfully submitted,

WILLETT WILSON
Attorney for Petitioner,
Willett Wilson

CERTIFICATE OF SERVICE

Three copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit have been furnished to Mr. Harry F. Maddin, Attorney for Respondents, by depositing same in the United States Mail addressed to Mr. Harry F. Maddin, P. O. Box 2207, Victoria, Texas 77901, on this, the day of June, A.D. 1969.

WILLETT WILSON, Of Counsel

APPENDIX A

UNITED STATES CONSTITUTION

Amendment Fourteen - Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

TEXAS CONSTITUTION

Article VIII, Section 1 - Equality and uniformity; tax in proportion to value; poll tax; occupation taxes; income taxes; exemption of household furniture.

Section 1. Taxation shall be equal and uniform. All property in this State, whether owned by natural persons or corporations, other than municipal, shall be taxed in proportion to its value, which shall be ascertained as may be provided by law. It may also impose occupation taxes, both upon natural persons and upon corporations, other than municipal, doing any business in this State. It may also tax incomes of both natural persons and corporations other than municipal, except that

persons engaged in mechanical and agricultural pursuits shall never be required to pay an occupation tax; provided, that the two hundred fifty dollars worth of household and kitchen furniture, belonging to each family in this State shall be exempt from taxation, and provided further that the occupation tax levied by any county, city or town for any year, on persons or corporations pursuing any profession or business, shall not exceed one-half of the tax levied by the State for the same period on such profession or business.

U.S.C., TITLE 28

Section 1254. Court of appeals; certiorari; appeal; certified questions.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

Section 1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

Article 342-709. Adverse claims to deposits; disclosures as to amount deposited

No bank shall be required to recognize the claim of any third party to any deposit, or withhold payment of any deposit to the depositor or to his order, unless and until the bank is served with citation or other appropriate process issuing out of a court of competent jurisdiction in connection with a suit instituted by such third party for the purpose of recovering or establishing an interest in such deposit; neither shall any bank be required to disclose the amount deposited by any depositor to third parties except where (i) the depositor or owner of such deposit is a proper or necessary party to a proceeding in a court of competent jurisdiction in which event the records pertaining to the deposit of such depositor or owner shall be subject to disclosure or (ii) the bank itself is a proper or necessary party to a proceeding in a court of competent jurisdiction or (iii) in response to a subpoena issued by a legislative investigating committee of the Legislature of Texas, or (iv) in response to a request for examination of its records by the Attorney General of Texas pursuant to Article 1302-5.01 et seq. of the Texas Miscellaneous Corporation Laws Act. As amended Acts 1963, 58th Leg., 1.1135, ch. 440, §1.

Article 7145. All property taxed

All property, real, personal or mixed, except such as may be hereinafter expressly exempted, is subject to taxation, and the same shall be rendered and listed as herein prescribed. Acts 1876, p. 275; G. L. vol. 8, p. 1111.

Article 7147. "Personal property"

Personal property, for the purpose of taxation, shall be construed to include all goods, chattels and effects, and all moneys, credits, bonds and other evidences of debt owned by citizens of this State, whether the same be in or out of the State; . . .

APPENDIX B

WHELAN vs. STATE, 282 SW2d 378, 383

Article 7329 limits the defenses which may be interposed to suits for delinquent taxes. Subdivision 3 of that article reads as follows: "That the taxes sued for are in excess of the limit allowed by law, but this defense shall apply only to such excess." The language of subdivision 3 cannot be construed to mean that a taxpayer may defend against a suit for taxes only when his property is assessed at more than its fair market value or when the rate levied is in excess of that allowed by law. To so hold would require that the statute be held unconstitutional for it would operate to deny to the taxpayer his constitutional right to be taxed on an equal and uniform basis with others. The legislature has no power to sanction discrimination between taxpayers by taking away defenses.

WILSON vs. CITY OF PORT LAVACA, 407 SW 2d 325, ref. n.r.e. [9, 10]

We hold that the trial court did not err in refusing to permit the Appellants to take the depositions of officers of the various financial institutions or in quashing the subpoenas under the facts of this case. Article 342-709, V.A.C.S., Rule 177a and 188b, T.R.C.P.

HILLSBOROUGH T.P. vs. CROMWELL, 66 S. Ct. 445, 451 [13-16]

A remedy at law cannot be considered adequate so as to prevent equitable relief unless it covers the entire case made by the bill in equity.

MILLIGAN vs. CORSICANA INDEPENDENT SCHOOL DISTRICT, 381 SW2d 97, 98, ref. n.r.e. [1]

The failure to include the deposits of the bank in the district's valuation rendered the tax plan fundamentally erroneous. Whelan vs. State, 155 Texas 14; 282 SW2d 378.

SILER vs. LOUISVILLE & N.R. CO., 29 S. Ct. 451, 454

The federal question as to the invalidity of the state statute because as alleged, it was in violation of the Federal Constitution, gave the circuit court jurisdiction and, having properly obtained it, that court had the right to decide all the questions in the case, even though it decided the federal questions adversely to the party raising them, or even if it omitted to decide them at all, but decided the case on local or state questions only.

APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 26715

WILLETT WILSON,
Plaintiff-Appellant,

versus

CITY OF PORT LAVACA, TEXAS, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Texas

(April 28, 1969)

Before GEWIN, McGOWAN* and MORGAN, Circuit Judges.

PER CURIAM: The background of this appeal is set forth in an opinion by Judge Conally, 285 F. Supp. 85 (1968), writing for a three-judge court (Brown, Circuit Judge, and Conally and Singleton, District Judges) constituted by reference to 28 U.S.C. 2281. In that opinion Judge Conally stated the conclusion of himself and his colleagues that appellant's claim for injunctive and declaratory relief was not within the scope of the statute providing for consideration by a three-judge court, nor did it state a cause of action which, on the merits, was appropriate for judicial relief. Speaking also in

*Judge Carl McGowan of the District of Columbia Circuit, sitting by designation.

the capacity of a single District Court judge, Judge Conally adopted the reasoning of the three-judge court as his own, and entered a judgment dismissing the complaint. See generally, Jackson v. Choate, 404 F. 2d 910 (5th Cir. 1968), and Smith v. Ladner, 260 F. Supp. 918 (S.D. Miss. 1966).

On petition for a writ of certiorari, the United States Supreme Court regarded the matter as being before it in the posture of an appeal from a decision by a single-judge District Court that the convening of a three-judge court was not warranted. It concluded, accordingly, that the appeal lay to a Court of Appeals and not to the Supreme Court, and it directed that appropriate steps be taken to enable such an appeal to be taken. 391 U.S. 352 (1968). This is that appeal.

We have considered the reasons adopted by Judge Conally for his refusal to convene a three-judge court and for his dismissal of the complaint as stating no claim for either injunctive or declaratory relief appropriately to be granted by the District Court. We find them persuasive to the point of requiring no elaboration by us. The judgment appealed from is, accordingly,

AFFIRMED.